No. 210

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

RAPID ROLLER CO., A CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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CASES

STATUTES AND MISCELLANEOUS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Rapid Roller Co., your petitioner, prays that a writ of certiorari be issued to review a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, approving, with a single modification, an order of the National Labor Relations Board, and a decree by that court enforcing compliance with the requirements of that order.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (4 R. 2035-2050) is reported in 126 F. 2d 452. The findings of fact, conclusions of law, and order of the National Labor Relations Board (1 R. 216-274) are reported in 33 N. L. R. B. No. 108.

JURISDICTION

The opinion of the Circuit Court of Appeals was filed, and its original judgment of approval with modification entered, February 2, 1942 (4 R. 2034, 2051). Petition for rehearing was denied April 9, 1942 (4 R. 2051-2052). The decree of the Circuit Court of Appeals, enforcing compliance with the Board order, was entered on May 8, 1942 (4 R. 2070). The jurisdiction of this Court is invoked under under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and under § 10(e) of the National Labor Relations Act.

QUESTIONS PRESENTED

The following questions are presented for consideration in connection with this petition for writ of certiorari:

(1) Has petitioner been accorded its right to a fair hearing and due process of law where the Circuit Court of Appeals, upon petitions for review and enforcement of an order of the National Labor Relations Board, (a) admittedly looked "only to the evidence that is favorable to the Board" and (b) ignored undisputed facts requiring a different result?

(2) Does § 2(3) of the Act alone operate to extend or create a contract of employment so as to authorize the Board to order reinstatement of strikers, and back pay, for a period wholly subsequent to the termination of the employer-employee status under the express terms of the written contract of employment between the parties?

(3) Is the Board authorized to find that an employer has refused to bargain collectively, and to predicate thereon an order of reinstatement and back pay, where it is admitted that the employer (a) has entered into successive collective agreements with its employees, (b) has conducted constant negotiations respecting plant transfers and hiring notwithstanding there was

no closed shop agreement, (c) has acceded to two Union complaints respecting specific instances of plant transfers, but (d) while intensively negotiating respecting a third complaint, refused to accede to the Union demands for the discharge of four newly hired employees and one old employee?

(4) Upon reviewing a back pay order of the Board and in remanding the case with instructions to make due allowances for the unjustified refusal of employees to take desirable new employment, is a Circuit Court of Appeals authorized (a) to direct how and upon what theories the matter is to be determined by the Board and (b) to place the burden of proceeding and proof upon the employer—despite the holding of this Court that the matter is peculiarly one for the original discretion and initiative of the Board?

(5) Is the Board authorized to order back pay for strikers for a period prior to an offer by them to return to their positions?

The following questions are presented for brief and argument on the merits in case the writ is granted:

(6) Can a finding by the Board of interference, restraint, and coercion in violation of § 8(1) of the Act be sustained as a matter of law where the undisputed facts are that (a) the plant was promptly and completely unionized, (b) the employer immediately and constantly recognized the Union as the exclusive bargaining agent for its employees, (c) every employee eligible to membership in the Union had exercised and enjoyed every right guaranteed by § 7 of the Act, and (d) statements attributed to the employer at no time had any coercive effect upon the employees?

(7) Was the Board authorized to make the blanket provision of Paragraph 1(c) of its order prohibiting any violation of the statute?

(8) Was the Board authorized to find discriminatory discharge, and to make an order for reinstatement or

back pay, with respect to two employees (a) who were not members of the Union or eligible for membership therein and had, in fact, by the Union itself been denied transfer to a unionized position and (b) whose discharge after a strike began was occasioned solely because the men to whom they were assistants had been transferred to other positions leaving nothing for those two employees to do except take positions vacated by strikers which they declined?

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, July 5, 1935, 49 Stat. 449, 29 U. S. C. sec. 151, *et seq.*, are—

* * * * * * *

Definitions.

Sec. 2. When used in this Act—

* * * * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * * * *

Rights of Employees.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives

of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

* * * * * * *

STATEMENT

This proceeding involves an order of the National Labor Relations Board directing the reinstatement of strikers, with back pay over a period of more than three years and aggregating several hundred thousand dollars. The plant had long been unionized; the employer had recognized the

Union as the exclusive bargaining agent for the employees; and successive annual collective agreements had been entered between employer and employees. Under its interpretation of the then current contract, the Union thereafter claimed a right to veto the hiring of new men; the employer refused to accede to the Union's demands in this respect; and a strike followed. The Board found that the employer had not approached negotiations over the Union's interpretation with an "open mind" and predicated thereon its order for reinstatement and back pay. The facts are as follows:

Petitioner, Rapid Roller Co., is an Illinois corporation organized in 1920 (2 R. 845). In its plant, in Chicago, it manufactures and services rollers for printing presses and produces rubber "blankets" for use in lithograph and off-set printing (2 R. 845-847). Prior to 1937 its employees were not members of any labor organization, but in April of that year they organized Local No. 120 of the United Rubber Workers of America, affiliated with the C. I. O. (3 R. 1434). Until the immediate dispute here involved began in March 1939, every production worker in the plant was a member of the Union (2 R. 870-871, 944; 3 R. 1198-1199; 4 R. 1891). The plant, in the words of the Union president, was "one hundred per cent organized" (4 R. 1891).[1]

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[1] Until just before the strike, petitioner had in its employ 89 production workers, all of whom belonged to Local 120. Thirteen of these were in the machine shop, 13 in the blanket department, 39 in the mercury department (a department in which rubber coverings were made and attached to cores of printing press rollers), 17 in the composition department (a department in which a composition covering was made and attached to the cores of printing press rollers), and 7 were janitors, watchmen, firemen, and shipping room employees (1 R. 95-97; 4 R. 1898-1900). The Union did not admit to membership the laboratory employees, the truck drivers, the salesmen, or the general office staff (1 R. 100-101).

Immediately upon the organization of the Union in April 1937, the employer recognized it as the bargaining agent of all the production employees, negotiated with it, and entered into a written agreement with it for the period of one year (1 R. 100, 301-302; 2 R. 690-691, 943-946; 4 R. 1802-1805).

In the early part of 1938 the previously experimental "blanket" department first became commercially profitable (2 R. 852, 938, 1036; 3 R. 1462).[2] Ability to perform skilled work, including capacity to handle sensitive machinery, were required of employees in that department.[3] The subsequent differences between the employees and employer involved the matter of transfers to, or hiring in, that growing department:

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[2] In 1938 and 1939 there were only 13 employees in the blanket department (1 R. 97). The only men who understood the manufacture of these rubber blankets were those 13 men, a foreman, a scientific man in petitioner's laboratory, and a few graduates of the blanket department who were then serving as salesmen and office men (3 R. 1216, 1230, 1307).

[3] The blanket department was a new and expanding branch of petitioner's business. Its product was wholly unlike those of its other departments. The rubber "blankets" were made by applying 180 to 220 separate spreads of thin layers of rubber to a basic special cotton fabric (2 R. 846-847, 963, 968; 3 R. 1073-1074). The many thin layers of rubber aggregated in thickness only twenty-one thousandths of an inch (2 R. 963). The blanket so produced was different from any other (2 R. 938). Unusual and sensitive machinery was used in the manufacture of the blankets (2 R. 966). The rubber blanket makers had to read micrometers and gauges and make very particular settings on their machines (3 R. 1108). The blankets, made in huge pieces 30 to 40 yards in length (2 R. 963; 3 R. 1218), were very expensive, each costing several hundred dollars (2 R. 964). By reason of the precision and delicacy of the manufacturing operation, it was very easy to ruin a blanket; a variation of one and one-half thousandths of an inch in thickness of any part of the blanket necessitated the rejection of all of it (2 R. 963), thereby causing a substantial loss to the manufacturer. Workers in the blanket department had to go through a period of special training (3 R. 1110, 1108, 1123, 1241, 1242, 1230; 2 R. 852).

In April 1938 the Company transferred a Union man, one Meskan, from the machine shop to be a spreader's helper in the blanket department. Thereupon Moore, the Union's shop committeeman for the latter department, objected and insisted that the position be given to Moore's brother who is described in the 1937 contract with the Union as a colored janitor (4 R. 1806). Although the contract then in effect contained no seniority provision (1 R. 230 note 12; 4 R. 1802-1806), Moore insisted that his brother have the position because of departmental seniority and threatened to close the plant by a strike otherwise (1 R. 446; 3 R. 1065-1069, 1179). The Company's president, Rapport, a man of diminutive size (3 R. 1457), then went to the blanket department and had a heated argument with Moore (1 R. 446; 2 R. 948; 3 R. 1068). Moore told Rapport that he would "wring [the latter's] fat neck" (1 R. 232). Rapport, according to Moore's testimony, had picked up a "crank handle" and used it threateningly (1 R. 444); and he ordered Moore discharged (1 R. 232). Although the Union contract provided that "there will be no strike, stoppage or lockout during the period of this agreement pending the settlement of any disputes" (4 R. 1805), Moore promptly persuaded the men in the blanket department to engage in a sitdown strike (1 R. 446-447; 2 R. 948-949). Rapport immediately reinstated Moore, gave the disputed job to Moore's brother, and the strike ceased (1 R. 446-447; 3 R. 1068-1069). The court below mentions the "crank handle" aspect of that incident three times and lays chief reliance upon it to sustain the Board's order herein (4 R. 2039, 2041, 2046), but the Board held that there had been no refusal to bargain in that instance (1 R. 233).

In the same month as the Meskan affair, April 1938, the Union contract was to expire; and, after negotiations ex-

tending over a period of about ten days, a new contract was agreed to and signed (1 R. 91-97, 305, 450, 451; 3 R. 1336).[4] The contract—which named every production worker, defined his job, and stated his weekly wage for the term—was to be in force for one year after April 23, 1938 (1 R. 94-97). The Union had endeavored to secure a closed shop provision (4 R. 1815, 1817), but finally consented to its elimination (1 R. 517-518; 2 R. 636-639, 851-854, 869-874; 3 R. 1326-1340). The Company acceded to a seniority clause for promotions, better terms as to hours and overtime, and an increase of minimum pay and general wages (2 R. 885, 874-878).

In September 1938 the Company transferred chemical laboratory assistant Levy to the blanket department (3 R. 1181-1182), but the shop committee objected on the ground that there were two or three production employees in other departments not then working (1 R. 312, 519, 643-644; 2 R. 957; 3 R. 1184). After the employer had called back to work those men who had been temporarily idle (2 R. 957-958; 3 R. 1183, 1226-1227; 4 R. 1963), the Union still objected to the transfer of Levy to the blanket department and instituted a second sitdown strike, this time throughout the whole plant, to which the Company yielded in a few hours (1 R. 311-315, 453-468, 518-522, 537-541; 2 R. 641-646, 955-961, 1032-1034; 3 R. 1180-1186).

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[4] Negotiations for the new contract for the year commencing April 23, 1938, opened on April 20 with submission of a draft by the Union to the Company and lasted for about ten days (1 R. 305, 451; 2 R. 849-850; 3 R. 1322; 4 R. 1814-1819). After discussion (2 R. 636-641, 850-865), submission of a counterdraft by the Company (2 R. 868-869; 4 R. 1935), a meeting in which further changes were suggested and discussed (2R. 868-880), and submission and discussion of a third draft on April 28, 1938, which was approved by the full membership of the Union (2 R. 880-885), the new contract (1 R. 91-97) was executed retroactively as of April 23, 1938 (1 R. 450; 3 R. 1336).

As to that incident, the Board again found no refusal to bargain (1 R. 237).[5]

In October 1938 the need for additional personnel in the growing blanket department became acute and Rapport, without success, attempted to work out an agreement regulating transfers from one department to another. He prepared a ten-point memorandum (1 R. 240; 4 R. 1806-1807) and submitted it to the shop committee for their reactions (2 R. 961). The committee found it unacceptable (4 R. 1807-1809); and the committee's counter proposals were unacceptable to the management because they insisted upon the Union grievance committee being given jurisdiction over the question whether the work of an employee transferred to the blanket department was satisfactory (2 R. 962-976; 4 R. 1808). The immediate negotiation was dropped after the employer made one further inquiry as to whether there was anything that could be done and received a negative answer (2 R. 967).

Later, in January 1939, the Company's foremen initiated and held a number of meetings with the shop committee in an attempt to agree on men to be transferred to the blanket department (1 R. 525; 3 R. 1101-1109). Beginners in the blanket department had to be specially trained (see note 3, *supra*) and had to start at the minimum plant wage of $25.00 per week (1 R. 94; 3 R. 1079-1080, 1110, 1123, 1242). Of petitioner's 89 employees, only 12 were earning as little as that minimum wage and most of these were doing the work of porters, janitors and common laborers (1 R. 95-97). The management believed them incapable of learning or performing the precise work of making costly lithograph blankets (2 R. 964, 966, 974; 3 R. 1107-

[5] At the time of the attempted transfer, Levy was not a member of the Union, being ineligible because he had not been a production employee (1 R. 100-101). A few months later the Union reversed its position and requested that he be transferred to the blanket department (1 R. 331-332, 477; 2 R. 977-978).

1108, 1241, 1105, 1121-1122). The committee at the request of the foremen submitted a list (1 R. 541; 4 R. 1809) but later withdrew some names (2 R. 656-657; 3 R. 1079, 1109, 1116-1117, 1138-1139). The foremen agreed to take immediately two of the men finally proposed by the Union, and they had no objection to two others, but the Union refused to agree unless others of greater seniority—whom the foremen considered unfit for the technical work of the department—were taken first (3 R. 1105-1106, 1117-1122, 1136, 1240-1242). The shop committee declined to negotiate further (3 R. 1122, 1124, 1136).

Thereupon, in February 1939, every worker in the plant being engaged full time (2 R. 972; 3 R. 1200), the Company hired four new men for the blanket department at the minimum plant wage (2 R. 839; 3 R. 1142-1150, 1187-1198; 4 R. 1581). It was that hiring and the strike which followed, fully described below in Point I(B) of the argument, which led to the Board proceedings here involved. The strike began on March 10, 1939 (1 R. 250). Pending negotiations in attempted settlement continued thereafter (1 R. 252), but the Union never withdrew from its position in any respect (1 R. 335-336; 2 R. 900, 904; 3 R. 1365-1367, 1374-1375, 1381-1382; 4 R. 1778, 1910-1911). The Union contract with the Company expired on April 23, 1939, which was forty-four days after the strike began (1 R. 91, 94). On and after April 23, 1939 (the date of the expiration of the contract) and before May 9, 1939 (the date of an alleged offer of the 84 strikers to return to work, which is discussed below in Point II(B) of the argument) the Company had secured a full complement of 93 men to work in the plant, including six strikers who had applied for and been given their old jobs (1 R. 119; 3 R. 1388; 4 R. 1901-1906).[6]

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[6] After the strike began, most of the laboratory employees went to work in the factory, since none of the ordinary operations of the

After the commencement of the strike, the Union filed with the Board its original charge dated June 8, 1939 (1 R. 33) and an amended charge dated November 30, 1939 (1 R. 36). The Board issued its complaint dated December 1, 1939 (1 R. 40) and the taking of testimony began on December 11, 1939 (1 R. 280). Oral argument was heard on October 1, 1940 (1 R. 215).

The Board found that petitioner had interfered with the employees' right to organize (1 R. 228, 233) and had refused to bargain collectively with respect to the hiring of the four men in March 1939 (1 R. 257). Board Member Leiserson, one of the two members of the Board who had heard the arguments, dissented from both findings (1 R. 273-274).[7] The order of the Board, entered July 19, 1941 (1 R. 273), directed the Company to cease and desist from (a) refusing to bargain collectively, (b) discouraging membership in the Union, or (c) in any manner interfering with the guarantees of § 7 of the Act. Affirmatively, it directed petitioner to (a) bargain collectively with the Union, (b) reinstate the strikers, (c) give them back pay from the date of an alleged offer by them to return to their posts,

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laboratory was continued; but Schnitzer and Levy, laboratory boys, declined to work in the factory in the place of strikers on the ground that it was against their principles to do so (2 R. 817, 822, 826) and remained in the laboratory doing nothing (2 R. 820-821, 827, 828; 3 R. 1223, 1225). Subsequently they made sample rollers, did control work, cleaned up the laboratory, and washed the windows (2 R. 820, 1203). Finally, on March 17, factory manager Schartz told Schnitzer that the company was not busy and did not need him any more (2 R. 821). On March 24, Levy was given an extra week's pay and was discharged for lack of work for him to do (2 R. 828, 1 R. 263). The Board has ordered the reinstatement of one and back pay for both (1 R. 260-265, 270, 272), and the court below has affirmed (4 R. 2047-2049, 2072). Its ruling on this detached phase of the case is specified as error (No. 8) and stated as one of the questions presented (No. 8) for brief and argument on the merits in case this petition is granted.

[7] Chairman Millis, who later became a member of the Board and had not heard the arguments (1 R. 215), participated in the final decision and thus cast the deciding vote with Board Member Smith (1 R. 273).

(d) reinstate one non-union non-production employee who had been discharged subsequent to the strike and (e) give the latter, and another in the same category, back pay, (f) post the usual notices, and (g) make the usual report of compliance within ten days (1 R. 270-273).

The court below sustained the order of the Board in all respects except that it remanded the cause for further proceedings as to deductions from back pay for the unjustified refusal of employees to take other suitable employment (4 R. 2035-2050), ordered compliance (4 R. 2051), and entered a decree accordingly (4 R. 2070-2073).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In depriving petitioner of the scope of judicial review required by the Fifth Amendment to the Constitution and provided by the Labor Relations Act, by refusing to consider any evidence—though admitted, indisputable, and controlling—except that deemed favorable to the Board's order;

(2) In approving and enforcing the Board's order directing, with respect to the strikers, reinstatement and back pay subsequent to the date of termination of employment expressly provided by the collective contract of employment entered into between the employer and the employees;

(3) In holding that there was any substantial evidence upon which the Board could lawfully (a) find petitioner guilty of a failure to bargain collectively and (b) order the reinstatement of the strikers with back pay;

(4) In prescribing by its judgment and decree of remand how and upon what theory the Board should determine deductions from back pay for the unjustified refusal

of strikers to accept other desirable employment; and in placing upon petitioner the burden of proceeding and proof with respect thereto;

(5) In failing to hold that the Board was not authorized to order back pay for strikers during the strike and prior to an offer by them to return to work; and in failing to hold that the Board did not have substantial evidence before it upon which it could lawfully find that the strikers had made an adequate offer to return to their jobs;

(6) In approving the Board's findings and enforcing its order respecting petitioner's alleged interference, restraint, and coercion of its employees in the exercise of their rights under § 7 of the Act;

(7) In enforcing the blanket provision in Paragraph 1(c) of the Board's order prohibiting any violation of the statute;

(8) In holding that the Board had before it substantial evidence (a) upon which it could find that the discharge of two non-union employees was discriminatory and tended to discourage Union membership and (b) upon which it could lawfully order reinstatement of one and back pay for both;

(9) In entering its judgment approving, and decree enforcing, the order of the Board.

Specifications numbered 6, 7, and 8 will be briefed and argued on the merits in case the writ is granted.

REASONS FOR GRANTING THE WRIT

In reviewing the order, the court below announced at the outset that it would "look only to the evidence that is favorable to the Board" (4 R. 2036). It literally followed that unprecedented formula, disregarding both admitted facts and controlling testimony of the Board's own witnesses.

Only by the arbitrary exclusion of undeniable and pertinent facts were the Board and the Circuit Court of Appeals able to reach a decision against petitioner, as will appear from the argument below.

Here each finding of the Board has been inferred despite admitted facts to the contrary or "in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist." *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 340-341. See to the same effect *Gunning* v. *Cooley*, 281 U. S. 90, 94. Petitioner was thus denied a fair hearing and deprived of due process of law.[8]

I. THE BOARD'S ORDER REQUIRING THE REINSTATEMENT OF STRIKERS WITH BACK PAY IS UNAUTHORIZED BY THE ACT BECAUSE THE CONTRACT OF EMPLOYMENT HAD TERMINATED THERETOFORE AND, IN ANY EVENT, THERE WAS NO REFUSAL TO BARGAIN UPON WHICH SUCH AN ORDER COULD BE PREDICATED.

The reinstatement and back-pay provisions of the order of the Board (1 R. 266-268, 271-272) and of the decree of the court below (4 R. 2049, 2072) are unwarranted for two

[8] The rule of review adopted by the court below deprived petitioner of all opportunity for a defense—of what Mr. Justice Brandeis has called "due process in the primary sense." *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 681-682. In the words of Mr. Justice Cardozo, "the fundamentals of a fair hearing were not conceded to the company." *West Ohio Gas Co.* v. *Commission* (No. 1), 294 U. S. 63, 70; *West Ohio Gas Co.* v. *Commission* (No. 2), 294 U. S. 79, 81. Again in the words of Mr. Justice Brandeis, the ignoring of uncontradicted evidence is an "error * * * fundamental in nature" which "vitiated the whole process of reasoning by which the Department reached its conclusion" and constitutes "a denial of due process." *Northern Pacific* v. *Department of Public Works*, 268 U. S. 39, 44-45. Petitioner was thus deprived of a fair hearing before the Board in the first instance, and of that judicial review which both the Constitution and the Labor Relations Act itself guarantee.

reasons: (A) The employees' written contract of employment, fixing a definite term, had expired prior to the date of the alleged discriminatory refusal of reinstatement; and (B) there was no failure to bargain on the part of petitioner upon which to predicate those provisions of the order.

(A)

Since the strikers' contract of employment had expired by its terms prior to the date of the petitioner's alleged wrongful refusal to reinstate them, the Board's order requiring reinstatement and back pay thereafter was arbitrary, unauthorized, and unlawful.—All of the employees here involved had entered into a contract with petitioner, which listed each employee by name and number and specified his type of position, department, and wage rate (1 R. 95-97). It was clearly, as this Court has said, an employment contract. *Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342. The court below so referred to it (4 R. 2047).[9]

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[9] Even in the absence of statutory authorization for a union to be the bargaining agent of the employees, it is established that a collective bargaining agreement entered into between an employer and a union is a contract governing the tenure of employment and the wages of the employees, that an employee may sue the employer on that contract, and that an employee is bound by the terms of such a contract. *Rentschler* v. *Mo. Pac. R. Co.*, 126 Neb. 493, 253 N. W. 694, 95 A. L. R. 1; *Donovan* v. *Travers*, 285 Mass. 167, 188 N. E. 705; *Christiansen* v. *Local No. 680*, 126 N. J. Eq. 508, 10 A. (2d) 168, 171; *Beatty* v. *C., B. & Q. R. Co.*, 49 Wyo. 22, 52 P. (2d) 404, 407; *McGlohn* v. *Gulf & S. I. R. Co.*, 183 Miss. 465, 174 So. 250, 254, and 183 Miss. 445, 184 So. 71; *Yazoo & M. V. R. Co.* v. *Sideboard*, 161 Miss. 4, 133 So. 669. In *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 632, there was involved an employee's suit for wrongful discharge, based on the contract between a union and employer.

Some courts have said a union is not the agent of the member generally but is only his representative for a limited purpose, while others hold a union to be the principal and not the agent, and that such rights as the employees have will depend upon the contract as made by the union. But all hold that the tenure and rights of individual employees accepting work under a union contract are governed

That contract of employment had expired by its terms on April 23, 1939 (1 R. 91, 94) and the Company had secured a full complement of 93 men in the places of the 84 strikers (1 R. 119; 3 R. 1388; 4 R. 1901-1906). Nevertheless, the Board ordered petitioner to reinstate and give each striker back pay from May 9, 1939—the month following the expiration of the employment contract—to date (1 R. 266, 271). In so doing the Board made, and the court below approved, a new employment contract for an additional term. But, where there is a written contract for a fixed term, it expires with the term. 4 Williston, Contracts (rev. ed. 1936) § 1027, p. 2844. "Collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights * * * beyond its life, when it has been terminated in accordance with its provisions. * * * The rights of the parties to work under the contract are fixed by the contract. They persist during, they end with, its term." *System Federation No. 59* v. *Louisiana & A. Ry. Co.*, 119 F. 2d 509, 515 (C. C. A. 5), cert. denied 314 U. S. 656. In the leading case of *Rentschler* v. *Missouri Pac. R. Co.*, 126 Neb. 493, 253 N. W. 694, 700, 95 A. L. R. 1, in which an individual employee was permitted to base his action for damages for wrongful discharge on a collective bargaining contract, the court said: "The contract between the union and the railroad company was limited to just one year, and therefore expired at the end of a year, and plaintiff could only recover for that period." See to the same effect *National Labor Relations Board* v. *Lion Shoe Co.*, 97 F. 2d 448, 453; *Perras* v. *Terminal R.*

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by the contract's terms. *System Fed. No. 59* v. *Louisiana & A. Ry. Co.*, 119 F. 2d 509, 514 (C. C. A. 5), cert. denied, 314 U. S. 656.

The Illinois courts have followed the Massachusetts rule laid down in *Donovan* v. *Travers, supra*, that a union is the principal and that the employee is bound by the contracts of the union. *Evans* v. *Johnston*, 300 Ill. App. 78, 93-94, 20 N. E. 2d 841, leave to appeal denied by Illinois Supreme Court and cert. denied 309 U. S. 662.

Assoc. of St. Louis, 154 S. W. 2d 417 (Mo. App. 1941); and *Knowles* v. *Terminal R. Assoc. of St. Louis,* 154 S. W. 2d 606 (Mo. App. 1941).

In the absence of a new written contract or an implied contract arising out of continued employment, there was nothing upon which to fix the terms or conditions of employment after the termination of the written contract here involved; for there were no standards or guides upon which to determine wages or any of the other elements of a modern labor contract. All authorities hold that rights of seniority and rates of pay depend wholly on contract; and there is no power in the Board to require the employees to serve beyond their agreed term of employment, or to order the employer to accept and compensate services beyond the fixed and written period upon which it had agreed. The National Labor Relations Act "does not compel agreements between employers and employees." *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 45; *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515, 548; *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, 570-571. Only the parties—the employees and the employer—can make such a contract (*In re Buffalo & E. Ry. Co.,* 250 N. Y. 275, 165 N. E. 291, 292), at least under the circumstances here where they had entered a written employment contract and, as an express term thereof, had mutually agreed that it should terminate upon a fixed date.[10]

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[10] *Cf. Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 182, 187, where there was no general collective employment contract. Employees were hired under individual contracts of indefinite duration. There were vacancies to be filled, and they were being filled, but the employer refused to hire union men. The Board—and the reviewing courts—therefore had before them elements upon which to order employment of those applicants and compensation for their loss of pay following the unlawful refusal of employment. But in the present case there was a written collective employment contract prior to the strike, which had expired by its own terms as to the men named therein. Prior to that expiration date, none of the men

The statute does not supply a contract in these circumstances. Before the passage of the Act, a strike terminated the relation of employer and employee (*Birmingham T. & S. Co.* v. *Atlanta B. & A. Ry. Co.*, 271 Fed. 743, 745), and the only purpose of § 2(3) was to change that rule. Accordingly, § 2(3) of the Act provides that the term "employee" shall include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice." The court below held that, despite the written agreement of the parties to the contrary, "when the employees went out on a strike because of the unfair labor practice of the company, their status as employees for the purpose of any controversy growing out of that unfair labor practice was fixed" by § 2(3) of the Act (4 R. 2047). But, manifestly and necessarily, the employee status of strikers may change despite the statute—as by death, the voluntary assumption of a different permanent employment, unlawful violence, or—as in this case—the agreed termination of the contract of employment.

Section 2(3) of the statute is purely negative in effect. It was intended to mean no more than that employee status shall not cease during a strike, *merely because of the strike*. Sen. Rept. No. 573, 74th Cong., 1st Sess., pp. 6-7. Here, for example, one of the strikers died and the Board recognizes that his status as an employee terminated thereby (1 R. 267). As against the contention that the status of striking employees becomes fixed and unchangeable, this Court has held that "such a legislative intention should be found in some definite and unmistakable expression" and has found "no such expression in the cited

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had asked reinstatement, and hence none were refused employment. When reinstatement was finally suggested, there were no vacancies to be filled (1 R. 119; 3 R. 1388; 4 R. 1901-1906) and the strikers did not even consider reinstatement except upon conditions they had no right to impose (see Point II(B) *infra*).

provision." *Labor Board* v. *Fansteel Corp.*, 306 U. S. 240, 255. As the concurring Justice therein stated (p. 264), there may be a termination of the employer-employee relationship during a strike "for reasons dissociated with the stoppage of work because of unfair labor practices. The language which saves the employee status for those who have ceased work because of unfair labor practices does not embrace also those who have lost their status for a wholly different reason." In the last cited case this Court held that employee status was lost by the unilateral discharge of striking employees guilty of unlawful violence. *A fortiori*, where as here the employees and employer have mutually agreed upon a contract of employment with a fixed termination date, employment ceased by mutual consent. This Court has heretofore suggested that, if construed to continue terms of employment despite unlawful conduct of employees, § 2(3) would be of doubtful constitutionality (*id.*, at 255, 265); it would be more plainly so if construed to extend terms of employment beyond the written agreement of the parties. *Wisconsin Creameries* v. *Sheboygan Dairy Products Co.*, 208 Wis. 444, 243 N. W. 498, 501-502; 6 Williston, Contracts (rev. ed. 1936) § 1758, p. 4995.

Plainly, the Board had no authority to order reinstatement, and no authority to order back pay, after the mutually agreed termination of the employment contract.[11]

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[11] Once the employee-employer relationship had ceased, "respondent was * * * free to consider the exigencies of its business and to offer reemployment if it chose" and in so doing it would be "simply exercising its normal right to select its employees." *Labor Board* v. *Fansteel Corp.*, 306 U. S. 240, 259. It may be admitted that, if petitioner were hiring men and if the strikers here involved had made applications for employment at that time, petitioner could not refuse them employment because they were Union men (*Phelps-Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 182, 187). But here there were no vacancies after April 23, 1939, the date of the expiration of the Union contract (1 R. 119; 3 R. 1388; 4 R. 1901-1906);

Moreover, the decision of the Board and of the court below is in conflict with the important and settled decisions of other federal courts as well as state courts cited above. The question of the effect of § 2(3) of the National Labor Relations Act on term contracts of employment arises in many industries, is important, and should be decided by this Court. For these reasons, the case should be brought here for review.

(B)

There was no unlawful refusal to bargain upon which the order for reinstatement and back pay could be predicated.—In any event, as the Board recognized, the order for reinstatement and back pay could only be predicated upon the theory that the employer, by acts in violation of the statute, had caused the strike and was therefore required to reinstate the strikers when they applied for reinstatement and, having failed to do so, must compensate them with back pay for the period following the alleged refusal to reinstate (1 R. 259-260, 265-268). The only act of the employer asserted by the Board to have caused the strike is the alleged refusal to bargain collectively (1 R. 228-259). The Board predicated its finding to that effect upon one incident—the hiring of four men and their retention over the Union's objections (1 R. 237-259). However, the court below, in recognition of the weakness of the case on this point, attempted to justify the Board's order upon other evidence, as follows:

The organization of the plant in 1937.—The Board's evidence showed that there had been attempts by the employer to discourage the unionization of the plant in the spring

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those strikers who had theretofore made application had all been reemployed (4 R. 1901-1906); and the remainder had not even considered reemployment after that date except upon conditions they had no right to impose (see Point II (B) *infra*).

of 1937, and upon this evidence the Board made a finding of interference in violation of § 8(1) and in disregard of the rights guaranteed by § 7 of the Act (1 R. 219-228, 228, 233).[12] But the order for reinstatement and back pay was not predicated upon that finding and could not have been; for the plant was promptly organized, all the production employees joined the Union (4 R. 1891), the Company entered successive collective bargaining contracts with the Union (1 R. 91-97, 4 R. 1802-1806), and according to the written statements of the Union itself amicable relationships existed thereafter between the employees and their employer (4 R. 1891, 1933), except for the two incidents mentioned next below.

The Board found no refusal to bargain during that period. But the court below erroneously treats the aspects of that earlier phase of the industrial relations of the Company as one of the elements of the refusal to bargain (4 R. 2036-2040, 2040) and in so doing has departed from the findings of the Board itself. For the Board limits its statement of background with reference to collective bargaining to the origin of the terms of the contract the interpretation of which was in dispute in the single incident (the hiring in March 1939, treated below) wherein it found a failure to bargain collectively (1 R. 239-246).

The Meskan and Levy incidents.—In the spring and fall of 1938 the employees protested the transfer of an employee to a position in the blanket department. In the first instance, the Company gave way to the Union protests and the Board found "no basis for holding that the respondent refused to bargain collectively * * * concerning the Meskan transfer, since the respondent, whether willing or

[12] That finding, while specified as error (No. 6) and stated as a question presented (No. 6) *supra* for brief and argument upon the merits in case this petition is granted, is not argued herein as a ground for granting the writ.

not, acceded to Local 120's demand that it remove Meskan from the position of spreader's helper" (1 R. 230-233, 233). Similarly, the Company yielded to the Union protests against the later transfer of Levy and the Board again found "no basis for holding that the respondent refused to bargain collectively" (1 R. 233-237, 237). The court below, however, departs from the Board's findings and cites those two incidents as showing an "arbitrary attitude" on the part of the Company (4 R. 2041-2042, 2042). As a matter of fact, it is undenied that, even after those two incidents, the Company extensively negotiated with the Union with respect to the subject of transfers from one department to another (2 R. 894, 961-976; 3 R. 1085-1087, 1102, 1105-1106, 1117-1122, 1124, 1213-1214, 1240; 4 R. 1806-1807). The Board found no refusal to bargain until March 1939, in connection with the hiring of four men, as follows:

The alleged refusal to bargain collectively in the hiring of four men in March, 1939.—Since the blanket department had gotten well into commercial production and was overwhelmed with work (3 R. 1070, 1073), the Company hired four new men to start work on March 2, 1939 (1 R. 237) at the minimum plant wage (2 R. 839; 3 R. 1187-1198; 4 R. 1941, 1943, 1951, 1953, 1955, 1957) which was less than 77 of the then 89 production employees were paid (1 R. 95-97).[13]

When these men reported for work, a controversy with the Union ensued. Since the employees in the blanket department performed highly specialized tasks of a precise nature, the matter of hiring in and transfers to that de-

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[13] The blanket department, being undermanned, was far behind in production and was forced to work overtime two hours each regular working day and also on Saturdays (2 R. 968, 1036; 3 R. 1070-1073). The employer had built additional machines for the blanket department, had arranged to build still more, and planned to put 14 to 16 additional men to work (2 R. 969, 973; 3 R. 1355).

partment was of the highest consequence as a matter of management.[14] Accordingly, in lieu of the closed shop and strict seniority provisions for which the employees had been contending (1 R. 517-518; 2 R. 636-637, 851-853, 861-862, 869-872, 876-877; 3 R. 1326-1340), the Company in the second contract with the Union had agreed only that "all applicants for employment shall be referred to the Shop Committee before going to work" (1 R. 92) and that "promotions shall be made in accordance with seniority so far as practicable, consistent with efficient operation" (1 R. 94, 238).[15] Since, in the incident here in issue, only hiring was involved, upon going to work the four new men were referred to members of the shop committee as the Board found (1 R. 237 n. 21). Not only was each of the new men told to join the Union and put in touch with the shop committeemen, but all were willing to join the Union (2 R. 839-841; 3 R. 1198-1199, 1142-1143, 1150; 4 R. 1581).[16]

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[14] See notes 2 and 3 *supra*.

[15] A transfer to the blanket department was not a promotion. There was no increase of wages on such a transfer. Beginners in the blanket department had to start at $25 a week, the minimum plant wage (1 R. 94; 3 R. 1079-1080, 1110, 1242). The average wage in the blanket department was less than the average wage in two of the other departments; the highest wages in the blanket department were less than the highest wages in other departments (1 R. 95-97). The work in the blanket department was neither more easy nor more pleasant, and in fact the heat and atmospheric conditions in the blanket department made it a less desirable place in which to work (2 R. 964). The only advantage (a disadvantage to some) of working in the blanket department was that at that time there was more overtime work in that department (2 R. 967-968, 1035); but that was a temporary condition due to the then shortage of workers in that department.

In any event the employer did not now attempt to transfer any employee to the blanket department. It did not because such a transfer was not, in the words of its contract with the Union, "practicable" and was not "consistent with efficient operation."

[16] Two of these new men, Haserodt and Prevost, joined in the strike which occurred a few days later and are among the 83 strikers ordered reinstated by the Board (1 R. 113; 2 R. 837-838; 4 R. 1582).

The Union, however, was not content but, as the Board found, took the position—despite the express language of the contract with the company—that the Company was required to negotiate with the Union respecting, and obtain its prior approval before, the hiring of new personnel (1 R. 238).[17] Thereupon an extended conference was arranged and took place on March 6 for four or five hours or more (1 R. 248; 2 R. 974, 1044; 3 R. 1346, 1360, 1363) between the five members of the shop committee reinforced by two representatives of the international union (1 R. 529; 3 R. 1347) and three representatives of the Company (2 R. 973).

At this meeting it is undenied that the Company representatives asked the grievance and expressed a willingness to negotiate respecting it (1 R. 358-359; 2 R. 887, 1047; 3 R. 1348, 1355), heard the Union's position that the hiring was a violation of the "harmonious relationship" clause of the preamble of the Union contract (2 R. 887-888; 3 R. 1349), and discussed the Union's position that the new men should have been referred to the shop committee in a body rather than individually (2 R. 888-889; 3 R. 1350). They obtained an acknowledgment from the Union representatives that all four of the newly hired men were willing to join the Union (2 R. 889; 3 R. 1350), and that all members of the shop committee had had full knowledge of the four new men within a few minutes of their reporting for work on March 2 (1 R. 498-499; 2 R. 889, 891; 3 R. 1350) and were

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[17] On March 2, immediately upon being informed of the employment of the four new men, the shop committee protested to the factory manager, Schwartz, claiming that under the Union's contract new employees could not be hired unless first found acceptable by the shop committee. They also claimed that positions in the blanket department were required to be filled by transfers from other departments. Rapport, the Company president, participated in part of this ten-minute discussion (1 R. 319-332, 467-469; 2 R. 652-654, 971-972; 3 R. 1199-1200).

in possession of all the facts relating thereto (1 R. 498-499; 2 R. 889-891, 894, 1047; 3 R. 1350-1351). The employer representatives were informed that the Union had no personal objection to any of the four new men hired (1 R. 498-499; 2 R. 889-891, 894; 3 R. 1350-1351). The Union representatives then shifted the argument to the meaning of the seniority provision respecting promotions (1 R. 362, 494; 2 R. 890-893; 3 R. 1351-1355). The question was discussed whether the hiring of new men and the filling of the four new positions at the lowest wage was a "promotion" (1 R. 324, 358, 365-366, 494; 2 R. 890-891, 892, 897), and whether strict seniority was practicable in all instances in view of the technical nature of the work in the blanket department (2 R. 892-894; 3 R. 1353, 1419).[18] The Union representatives then claimed that the hiring was a violation of the seniority proposal submitted by Rapport in 1938, but the employer representatives at the meeting pointed out that that proposal had been rejected by the Union itself (2 R. 891-892; 3 R. 1354); and a similar claim that Rapport had made a promise that no hiring would be done except with the approval of the shop committee was refuted by showing that changes had been made in the proposed contract to eliminate all requirements of a closed shop nature

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[18] The Union claimed that appointment to a blanket department job, even though at the lowest plant wage, was a promotion and that senior production employees from other departments should be transferred before new employees were engaged (1 R. 324, 358, 362, 365-366; 2 R. 890; 3 R. 1351-1352, 1419-1420). The employer claimed that the filling of a beginner's position in the blanket department, invariably at the minimum plant wage, was obviously not a promotion (2 R. 890, 897, 966; 3 R. 1351-1352) and that in any event, in the words of the seniority provision itself, it was not "practicable" and not "consistent with efficient operation" to transfer the senior janitors and common laborers to the blanket department (2 R. 892-894, 963-964; 3 R. 1353-1355). One of the most active of the Union representatives later admitted doubt "as to whether or not according to our contract we have any legal legs to stand on" (4 R. 1774).

and that the Company had always taken the position that the selection and assignment of new employees was a right of the management (2 R. 891-894; 3 R. 1351, 1355, 1361-1362). The discussion also embraced the burden which the management bore in connection with the problems of selection and assignment of employees, the danger of prohibitive losses which would be incurred by incompetent employees, and the need of more men in the blanket department (1 R. 324, 328; 2 R. 893, 1045; 3 R. 1352-1354). There was a discussion of prior transfer negotiations between the foremen and the shop committee (1 R. 325, 474; 2 R. 656, 894, 974, 1046; 3 R. 1352-1353), a suggestion that for the new positions the Union select two men and the Company two (1 R. 327, 475; 2 R. 896-897, 1048; 3 R. 1361), and the threat of a strike as to which the Company representatives pointed out that its contracts and the need of servicing through the composition and mercury departments made it necessary to keep the plant in continuous operation (1 R. 328; 2 R. 897-898; 3 R. 1357-1359). One of the Union representatives expressed the view that the controversy over the hiring of the four men was trivial and unimportant (1 R. 474, 495-496; 2 R. 655, 886-887, 1044; 3 R. 1348).

At the March 6 meeting the Union also demanded that one Schrambeck be discharged because the Union trial board had voted to expel him from the Union (2 R. 667-668, 895-896, 975, 1049; 3 R. 1356). The following day he was expelled from the Union, on an undisclosed ground; and then, on March 8 and 9, the Union in writing demanded, under threat of "drastic action," that the Company discharge that employee (2 R. 975; 4 R. 1915, 1917). But Schrambeck was an old and satisfactory employee; the plant was understaffed as has been said; and the employer, knowing of no cause for the discharge of Schrambeck, declined the demand (4 R. 1845).

The following day, March 10, there were two more discussions between the representatives of the Union and the Company (1 R. 331-332, 477; 2 R. 976, 1051-1052), at which the Company president pleaded with the shop committee to avert a strike (2 R. 976-978, 980). The Union witnesses themselves testified that the Company president then said that "no one wins in a war" (1 R. 332; 2 R. 658).[19] Nevertheless, on the same day, March 10, 1939, immediately after the last conference, the Union leaders called the strike (1 R. 333-334, 478; 2 R. 979), in which all of the employees joined except Schrambeck and two of the four new employees (1 R. 250; 4 R. 1898-1900). The Union leaders had asked their international union for strike authorization on the same day that the new men had been hired, and the local had voted to strike the following day (1 R. 248; and see the chronology set forth in the Appendix *infra*).

But negotiations continued even after the strike (1 R. 252). On March 13, 1939, Harry E. Scheck, a conciliator for the Department of Labor, held a two-hour meeting in his office attended by the shop committeemen and Company representatives but no agreement was reached (3 R. 1364-1368), the Company declining the conciliator's suggestion that the parties submit the matter to arbitration (2 R. 901-902; 3 R. 1367). On March 16, 1939, at another meeting in the conciliator's office, the Company representa-

[19] The circumstances of those discussions were as follows: On receipt of a telegram from the international union authorizing a strike (1 R. 330, 476) the shop committee and the Union president held a conference with Rapport at which they proposed a compromise involving the discharge of one of the four new men and transfer of Levy to the blanket department (1 R. 250-251, 331-332, 477; 2 R. 977-978) but continued to demand the discharge of Schrambeck (2 R. 976, 1051-1052). This meeting was adjourned until after lunch (1 R. 477). Upon resumption, Rapport said his former decision would have to stand (1 R. 332-334, 478; 2 R. 658-659, 976-978, 980).

tive offered to take all the men back on two conditions—that the Company be allowed to retain the four new men and that no one guilty of vandalism be reemployed (3 R. 1374)—but the Union refused the proposal, reiterating its demand that the four men be discharged and that the Company agree to engage no one in the future without the approval of the shop committee (3 R. 1375). On March 27, 1939, another meeting was held in the law office of the Company's attorney, at which its president and its attorney represented the Company. In addition to the shop committee, the United States labor conciliator and an assistant corporation counsel of the City of Chicago were also present (3 R. 1378-1379). At that meeting emphasis was placed upon the continued demand for the discharge of Schrambeck (3 R. 1380-1381; 4 R. 1697, 1778-1779, 1909, 1911). By that time many new men had been hired in the plant and there was not room for immediate reemployment of all the strikers, but the Company offered to take back immediately all those for whom it had vacant positions (3 R. 1380-1382, 1911). The Union refused to return unless all persons who had been employed to take their places were discharged (2 R. 916-917; 3 R. 1380-1382; 4 R. 1930). At this meeting the matter of the interpretation of the Union's existing contract was discussed; a Company representative stated his belief that the Company's interpretation had been correct (1 R. 252; 3 R. 1381); and a Union representative cut off further discussion, saying: "If you feel that way about it I don't see the use of this meeting. We might as well go" (3 R. 1381-1382).

There was no refusal to bargain.—Despite these facts, the Board found, as to the hiring of the four men, that petitioner had refused to bargain collectively "with an open fair mind" (1 R. 256-257). Upon this finding it

predicated its order for reinstatement and back pay (1 R. 259-260, 266-267, 271-272). But the basic finding is clearly arbitrary and unlawful, for the following reasons:

(1) From the foregoing statement of admitted and undeniable facts, it is clear that the Company not only negotiated and collectively bargained with the Union but it (a) recognized the Union, (b) made successive contracts with it, and (c) acceded to two of its three demands respecting transfers and hiring. As to the hiring of the four men, not only were there extensive negotiations as set forth above but the Union itself precipitated the strike as is shown by the chronology of events from March 2 to March 10 set forth in the Appendix to this petition. Plainly there was no refusal to bargain.

(2) As to the provision of the Union contract relating to seniority, the employer fully complied with its "obligation to meet and bargain with [the] employees' representatives respecting * * * its true interpretation" in accordance with the precisely applicable facts and rule laid down by this Court in *Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342-343; and the Board itself, as has been stated, expressly found no failure to collectively bargain with respect to the two transfer incidents here involved (1 R. 233, 237).

(3) Assuming that there was an issue as to the interpretation of the contract clause requiring that "applicants" be "referred" to the shop committee "before going to work", it is undeniably true, as set forth above, that the Company (a) referred the four new men to the committee within a few minutes of their reporting to work, (b) the committee had full knowledge of all the facts respecting them, (c) the Union had no objection to them personally, (d) they were willing to join the Union, (e) two of them joined the strikers and the Board has ordered them rein-

stated with back pay, (f) the Company negotiated intensively and repeatedly with the Union in the matter, and (g) the Union nevertheless precipitately called the strike.

(4) Not only did the Union not seriously rely upon the contract provision relating to the "reference" of newly hired employees to the shop committee "before going to work", but they placed emphasis upon the wholly different clause to the effect that

> Promotions shall be made in accordance to seniority so far as practicable, consistent with efficient operation. (1 R. 238.)

But here there was involved no promotion; the Company had merely hired four new employees at the minimum plant wage; and it so pointed out in its discussions with the employee representatives (see notes 15 and 18 *supra*). Upon the Union's insistence that the contract should be interpreted otherwise, the Company undertook the extended and intensive discussions set forth above.

(5) The immediate cause of the strike was at least as much the refusal of the employer to discharge Schrambeck who, for some undisclosed reason, was expelled by the Union—but there was not even an assertion that any provision or interpretation of the contract covered that situation. Not only under the facts was there no substantial claim by the Union respecting the interpretation of the contract, but the Union asked no modification or amendment thereof. Amid the confused claims, the Company did all it could reasonably be expected to do to reach an understanding and still preserve what it regarded as indispensable in the management of its business.

(6) The employer's only dereliction was its failure to agree to all the Union demands. Indeed, the court below branded petitioner's failure to agree, or "compromise", as

an "intransigent attitude" manifesting a refusal to bargain; and regarded unsuccessful negotiations as "purposeless talk" for which the employer alone is responsible (4 R. 2045). But Congress plainly intended that under the act employers should not be required to agree to all employee proposals, or indeed to any, so long as a bona fide attempt is made to reach an understanding. As Senator Wagner explained to the Senate when the measure was before it, the measure does "not compel anyone to make a compact of any kind if no terms are arrived at that are satisfactory to him."[20] This Court has been specific that the Act does not compel either party to agree.[21]

(7) What the Board, and the court below, have actually done is take detached excerpts from the record and upon them predicate a finding of lack of good faith. To that finding on the record there are conclusive answers. Pre-

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[20] 79 Cong. Rec. 7571 (1935). The legislative history of the Act is unequivocal on this point. "The bill requires no employer to sign any contract, to make any agreement, to reach any understanding with any employee or group of employees." "All employers are left free in the future as in the past to accept whatever terms they choose." Senator Walsh, 79 Cong. Rec. 7660 (1935). See also Sen. Rept. 573, 74th Cong., 1st Sess., May 2, 1935; and the decision of the Board in *Pittsburgh Metallurgical Co., Inc.*, 20 N. L. R. B. 1011 (1940).

[21] "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.'" *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 45. See also *Virginian Ry.* v. *Federation*, 300 U. S. 515, 549, 557 note; *Labor Board* v. *Mackay Co.*, 304 U. S. 333, 345-346; *Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 343, 344.

The decision in the case at bar is sharply inconsistent with the position manifested by the Board itself in its recent decision in *Montgomery Ward & Co., Inc.*, 39 NLRB No. 41, February 26, 1942, in which, notwithstanding the employer refused to yield to the Union's demands for a closed shop and arbitration, the Board held that the employer had not refused to bargain collectively. And see *National Labor Relations Board* v. *Express Pub. Co.*, C. C. A. 5, June 12, 1942, 3 C. C. H. Labor Law Service ¶6110.

liminarily, it may be noted that Congress did not intend that, in proceedings under the Act, the inevitably sharp interchanges in the conference room should be recanvassed and appraised in Board hearings. As Senator Walsh stated to the Senate when the then pending measure was before it, "What happens behind those doors is not inquired into, and the bill does not seek to inquire into it." 79 Cong. Rec. 7660.[22]

While it must be assumed that employer representatives made the statements attributed to them by the Union representatives and found by the Board, those cannot outweigh the obvious facts that the Company did negotiate and did bargain collectively respecting the Union's contentions as

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[22] It is notable that the Board refrained from producing the testimony of several Union participants in the meeting. The witnesses for the Board who undertook to narrate the proceedings of the March 6 meeting were Nielson (1 R. 323-328, 355-371), Moore (1 R. 248, 472-476, 491-499) and Sevenberg (2 R. 655-657, 667-668). The testimony of these three witnesses as to what was said at the meeting is vague, superficial, indefinite, and incomplete. They frequently stated that they did not remember what was said at the meeting on given subjects. Lanning and Bunger, national representatives of the Union who participated in the meeting, were experienced negotiators but they were not called to testify. Lanning was present at the hearing but was not put on the stand (4 R. 1799-1800). One of the shop committee members, Stephen Meyers, who was at the meeting (1 R. 529; 3 R. 1347), was twice a witness for the Board (1 R. 422-424; 4 R. 1570) but on neither occasion did he testify as to this meeting.

A stenographic report of the discussions of the five-hour meeting would undoubtedly make a transcript of more than 100 pages, yet the three Board witnesses attempted to narrate the discussion in a few brief answers.

Not only was the manifest impossibility and unwisdom of any attempt to unravel the mesh of a collective bargaining conference recognized by Congress as shown above in the text, but had it been intended that negotiations should be recanvassed by the Board in its proceedings Congress would have devised a technique whereby records of such negotiations might be made. The attempt of the Board to depart from the salutary intent of Congress can have the effect only of discrediting the Act and debasing procedure thereunder.

to the interpretation of the contract. The Board, however, picks detached phrases as showing a closed mind (1 R. 247-249, 254-255), but plainly those warrant no such finding for three reasons: (a) The statements attributed to the Company president as of March 2 (1 R. 246-247, 254-255) were not made in the course of bargaining but in the few moments of conversation which occurred on the morning the four new men were hired when the Union representatives first stated their complaint and requested an appointment for a subsequent conference as set forth above in note 17 and the text following it. (b) The Company promptly arranged and held a lengthy conference, in which several representatives of the employer participated, pleaded with the Union thereafter to avert the threatened strike, and negotiated even after the strike began. (c) The phrases italicized by the Board in reaching its conclusion (1 R. 247-249, 254-255) bear no such construction as the Board attempts to put upon them:

Even casual inspection of the record discloses that the parties to those conferences used their words in the light of the claims made by the Union. When the Union claimed that the *contract* meant that there must be "negotiation" with the Union as to the hiring of new men *preliminary* to any hiring, the Company representatives took the position that it had no such meaning and that, therefore, they were not required *by the terms of the contract* to negotiate individual cases *before* hiring. It was in that sense that the Company president made the statements (1 R. 321, 322, 468, 972) attributed to him as of March 2 in the Board's decision (1 R. 247, 254). It was in that sense that the Company representatives again used the words "negotiate" and "right" in the extended conference on March 6 (1 R. 248-249, 255). The point they were making was not that they would not negotiate with the Union, and not that the

Union had no right to negotiate; but they were merely stating their side of the controversy—that the *contract* did not require the Company to "negotiate" before each individual hiring and that the contract *by its terms* did not give the Union a "right" to insist upon such "negotiation."

These words and phrases cannot be read apart from their context, yet by the sheerest type of verbalism the Board has wrenched them from the background of the Union's contentions in the attempt to make it appear that the Company denied its general duty or willingness to "negotiate" and denied the "right" of the Union to have it do so. The Board, in short, has torn a handful of words from the record and, despite undisputed facts and events to the contrary effect, has made its finding of lack of good faith. This Court has recently remanded a similarly based case, saying that

> The employer * * * is as free now as ever to take any side it may choose * * * We may not consider the findings of the Board as to the coercive effect of * * * speeches in isolation from the findings as respects the other conduct of the Company. * * * If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone. (*Labor Board* v. *Virginia Power Co.*, 314 U. S. 469, 477, 479.)

That case, it may be noted, related to the initial organization of a plant where the anti-union bulletin and speeches may have had general effect; whereas in the present case the plant had been organized by the Union for two years, two successive collective contracts had been entered by the employer and employees, and the utterances are only those made during the collective bargaining process in response to the Union's interpretation of the then existing contract respecting the hiring of four new men.

Due regard for what this Court has long termed "the

substance, and not the shadow," which determines the validity of the exercise of administrative power (*Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452, 470), as well as the intent of Congress and petitioner's statutory and constitutional right to a fair hearing, require that this Court bring this case here for review. In the light of the undisputed facts, petitioner has been guilty of no refusal to bargain collectively within the meaning of the National Labor Relations Act; and, without the finding of failure to bargain, there was no basis for the order of reinstatement and back pay.

II. ASSUMING THAT THE EMPLOYEE RELATIONSHIP HAD NOT TERMINATED AND THAT THE EMPLOYER HAD REFUSED TO BARGAIN COLLECTIVELY, THE BACK PAY ORDER IS NEVERTHELESS UNAUTHORIZED AND REQUIRES THE EXERCISE OF THIS COURT'S POWER OF REVIEW.

Whether or not the employee relationship had terminated by the terms of the contract, or there had been a lack of good faith in the bargaining by the employer, as discussed in Point I above, the decree of the court below is nevertheless unlawful because (A) the remand places an unwarranted burden upon petitioner, and (B) the strikers have never offered to return to their jobs, except upon conditions they had no right to impose, so that there is no basis for the award of back pay.

(A)

In the terms of its remand of the case with instructions to determine deductions from back pay, the court below infringed the discretionary authority of the Board and imposed an unlawful burden upon petitioner.—The court below, though sustaining the order of the Board in other re-

spects, remanded the case with instructions to the Board to determine deductions from back pay for "unjustifiable refusal by the discharged and the striking employees to take desirable new employment" (4 R. 2051, 2073). In so doing, however, it confined such administrative proceeding to action on "such additional evidence, if any" as the Company might present. The petitioner is thus required, as though the proceeding were a mere private suit by the employer, to formulate its claim and theory on this subject.

The necessity of making deductions from back pay for employees' unjustified refusal to take other employment has been recognized by this Court. *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 197-200. But proceedings to that end are Board proceedings, not a private suit by the employer. *National Licorice Co.* v. *Labor Board*, 309 U. S. 350, 362-363. As this Court has held, it is a matter "entrusted to the Board's discretion," "it is not mechanically compelled by the Act," and

> the Board's order should not have been modified by the court below. The matter should have been left to the Board for determination by it prior to formulating its order. (*Phelps Dodge Corp.* v. *Labor Board, supra*, at 198-200.)

Here the Board had not considered the question. While the Circuit Court of Appeals had authority and was required to remand the case to the Board for a determination of the deductions, thereafter it is for the Board to determine the theory upon which it will proceed (*Phelps Dodge Corp.* v. *Labor Board, supra*, p. 198, note 7) and then to present its evidence and formulate its modification of the order. Petitioner is the respondent in the proceedings, and it is not for it to assume the burden of pleading or proof. To require petitioner to do those things not only infringes the Board's discretion but imposes an unlawful

and unwarranted burden upon petitioner. That error of the court below, therefore, requires the exercise of this Court's power of review.

(B)

The Board, and the court below, unlawfully ordered back pay for a period prior to any offer of the strikers to return to their positions.—Back pay has never been authorized or directed as to any period prior to an offer of strikers to return to work, and the Board did not purport to require it here.[23] But the Board found that the strikers had offered to return to work on May 9, 1939 (1 R. 259-260); and the Board's order (1 R. 265-266, 271-272), as well as the decree of the court below (4 R. 1072), requires back pay from that fixed date on the theory that the refusal to dismiss those who had taken their places and to reinstate the strikers on that date was a discrimination forbidden by the Act.[24]

But it is not denied that the strikers did not offer to return to their jobs unconditionally. In the course of a

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[23] For the practice of the Board, see the second paragraph of note 7 of the opinion of this Court in *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 198-199. See also the Fourth Annual Report of the Board (1939), pp. 100-102; *Hemp & Co. of Ill.*, 9 NLRB 449, 462 (1938); *C. B. Stout, d.b.a. Majestic Flour Mills*, 15 NLRB 541, 565 note 26 (1939); and *Somerset Shoe Co.*, 12 NLRB 1057, 1059 note 3 (1939), remanded for adjustment of back pay date, 111 F. 2d 681, 689-690.

It may be noted that the strikers in this case were acting upon the theory that they would be paid during the strike and, even before the strike began, had resolved to "demand back pay for every day they are on strike" (4 R. 1841).

[24] "Later orders have started back pay five days after application." *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 199 note 7. Even assuming that there was here an offer to return to work which the employer was bound to accept, still reinstatement is not necessarily feasible *instanter* and the Board should have clarified and adjusted its order respecting back pay as was required in *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. 2d 681, 689-690 (C. C. A. 1).

hearing in a State court upon an application to restrain violence and other unlawful conduct of the strikers, suggestion was made by the local master in chancery that the parties settle the strike; the Company promptly agreed to take back as many of the 84 strikers as could be used without displacing workers who had been obtained meanwhile in order to keep the plant running; but the Union would not agree unless all of the strikers were reinstated in a body (2 R. 1018-1019; 3 R. 1398-1400) as the Board itself found (1 R. 252, 259).

The strikers did not make any offer—they merely rejected the employer's offer. The effect of their counterproposal was that they would assent to a settlement of the strike only upon condition that (a) all strikers were immediately reinstated, (b) consequently all new employees would have to be discharged, (c) including two of the four new men whom the Union had objected to hiring just before the strike (the other two having joined the strikers are now required to be reinstated and are now presumably acceptable to the Union), and (d) Schrambeck, whom the Union had expelled and who therefore did not join the strike, would have to be discharged. The Union "just couldn't entertain a part of these men going back and sitting down and working with the non-union men" (2 R. 1019; 3 R. 1399).

In other words, the strikers offered to return to work if all their demands, which are alleged to have occasioned the strike, were first met. It was not an offer to cease striking and return to work, but a demand that the Company surrender and capitulate on every point. Viewed in its most favorable light, it was not more than a counter proposal for discussion which led to various, though ultimately fruitless, meetings between the parties (3 R. 1399-1400). The Company in those negotiations offered to take 10 or 20 strikers back at once and the remainder (except those

guilty of violence and sabotage) as rapidly as possible (1 R. 252; 2 R. 1018-1019; 3 R. 1398-1400), but the Union refused. The Board itself stated that "there is no testimony that any of the strikers made individual applications for reinstatement" (1 R. 259); and the record shows that all of the six strikers who made application for reinstatement were given their old jobs (4 R. 1901-1906). The strike thus continued not only beyond the date of the so-called offer of May 9, 1939, but throughout all of these proceedings and to date.

In these circumstances, there was no offer to cease striking and return to work, and consequently there was no refusal to reinstate strikers, such as would authorize the Board to require back pay and fix the date from which it could lawfully be computed. The action of the Board in inventing such an offer and date—which the court below accepted without question (4 R. 2047)—was arbitrary and unlawful. It is simply an indirect means of penalizing the employer's failure to accede to the Union's demands. It requires the exercise of this Court's power of review.

CONCLUSION.

This case presents questions important in the administration of the National Labor Relations Act. Among them are (1) the extension of term contracts of employment beyond the agreement of the parties, (2) the lawfulness of a finding of failure to bargain where extensive bargaining is manifest, (3) the authority of reviewing courts to limit and prescribe administrative procedure upon remanding a case to the Labor Board, (4) the authority of the Board to order back pay for strikers during most of a period of a still continuing strike, and (5) the lack of due process or fair hearing in administrative and judicial proceedings which ignore indisputable and admitted evidence. Conflicts

in the decisions of lower courts, the proper interpretation and administration of the Act, and justice to petitioner require that the case be brought here for review.

Respectfully submitted,

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